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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JAMES McNEIL,
12 CDCR #E-59262,

13 Plaintiff,

14
15 vs.
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18 MEL EPLY, et al.,
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20

21 Defendants.
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Civil No. 08-2053 WQH (CAB)

**(1) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[Doc. No. 5];**

**(2) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM INMATES'S
TRUST ACCOUNT; and**

**(3) DISMISSING ACTION
WITHOUT PREJUDICE FOR
FAILING TO STATE A
CLAIM AND FOR SEEKING
MONETARY DAMAGES AGAINST
DEFENDANTS WHO ARE
IMMUNE PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b)**

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25 James McNeil ("Plaintiff"), a state prisoner currently incarcerated at Folsom State Prison
26 located in Represa, California, and proceeding pro se, has submitted a civil rights Complaint
27 pursuant to 28 U.S.C. § 1983. Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP")
28

1 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4], along with a Motion for Appointment of Counsel
2 [Doc. No. 5].

3 **I. Motion for Appointment of Counsel [Doc. No. 5]**

4 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.
5 The Constitution provides no right to appointment of counsel in a civil case, however, unless an
6 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*
7 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are
8 granted discretion to appoint counsel for indigent persons. This discretion may be exercised
9 only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).
10 “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success
11 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the
12 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be
13 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,
14 1331 (9th Cir. 1986)).

15 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
16 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
17 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

18 **II. Motion to Proceed IFP [Doc. No. 2]**

19 All parties instituting any civil action, suit or proceeding in a district court of the United
20 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
21 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
22 if that party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
23 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
24 remain obligated to pay the entire fee in installments, regardless of whether their action is
25 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
26 (9th Cir. 2002).

27 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
28 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to

28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement indicates that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

III. Sua Sponte Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

Notwithstanding payment of any filing fee or portion thereof, the Prison Litigation Reform Act ("PLRA") requires courts to review complaints filed by prisoners against officers or employees of governmental entities and dismiss those or any portion of those found frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief from a defendant immune from such relief. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Prior to the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing a prisoner's suit make and rule on its own motion to dismiss before directing that the complaint be served by the U.S. Marshal pursuant to FED. R. CIV. P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim."); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). The district court should grant leave to amend, however, unless it determines that "the pleading could not possibly be cured by the allegation of other facts" and if it appears "at all possible that the plaintiff can correct the defect." *Lopez*, 203 F.3d at 1130-31 (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990)).

1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 2 allegations of material fact and must construe those facts in the light most favorable to the
 3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while liberal
 5 construction is “particularly important in civil rights cases,” *Ferdik v. Bonzelet*, 963 F.2d 1258,
 6 1261 (9th Cir. 1992), the court may nevertheless not “supply essential elements of the claim that
 7 were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268
 8 (9th Cir. 1982).

9 As currently pleaded, it is clear that Plaintiff’s Complaint fails to state a cognizable claim
 10 under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a
 11 claimant: (1) that a person acting under color of state law committed the conduct at issue, and
 12 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the
 13 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S.
 14 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986);
 15 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

16 First, Plaintiff names as a Defendant, Mel Eply, the attorney appointed to represent him
 17 during his criminal proceedings. However, a person “acts under color of state law [for purposes
 18 of § 1983] only when exercising power ‘possessed by virtue of state law and made possible only
 19 because the wrongdoer is clothed with the authority of state law.’” *Polk County v. Dodson*, 454
 20 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys
 21 appointed to represent a criminal defendant during trial, do not generally act under color of state
 22 law because representing a client “is essentially a private function ... for which state office and
 23 authority are not needed.” *Polk County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d
 24 1433, 1442 n.12 (9th Cir. 1992). Thus, when publicly appointed counsel are performing as
 25 advocates, *i.e.*, meeting with clients, investigating possible defenses, presenting evidence at trial
 26 and arguing to the jury, they do not act under color of state law for section 1983 purposes. *See*
 27 *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v.*
 28 *Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding that public defender was not

1 a state actor subject to suit under § 1983 because, so long as he performs a traditional role of an
 2 attorney for a client, “his function,” no matter how ineffective, is “to represent his client, not the
 3 interests of the state or county.”).

4 Accordingly, Plaintiff’s claims against Mel Eply must be dismissed for failing to state
 5 a claim upon which section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) &
 6 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

7 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the
 8 alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack on the
 9 validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C.
 10 § 1983 unless and until he can show that conviction has already been invalidated. *Heck v.*
 11 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir.
 12 2003) (“Absent such a showing, ‘[e]ven a prisoner who has fully exhausted available state
 13 remedies has no cause of action under § 1983....’”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*,
 14 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for allegedly
 15 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
 16 unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove
 17 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,
 18 declared invalid by a state tribunal authorized to make such determination, or called into
 19 question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87.
 20 A claim challenging the legality of a conviction or sentence that has not been so invalidated is
 21 not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

22 In *Heck*, the Supreme Court held that:

23 when a state prisoner seeks damages in a section 1983 suit, the
 24 district court must consider *whether a judgment in favor of the*
 25 *plaintiff would necessarily imply the invalidity of his conviction or*
 26 *sentence*; if it would, the complaint must be dismissed unless the
 27 plaintiff can demonstrate that the conviction or sentence has already
 28 been invalidated. But if the district court determines that the
 plaintiff’s action, even if successful, will not demonstrate the
 invalidity of any outstanding criminal judgment against the plaintiff,
 the action should be allowed to proceed.

1 *Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed
2 for failure to state a claim without prejudice to Plaintiff's right to file a new action if he succeeds
3 in invalidating his conviction. *Edwards*, 520 U.S. at 649.

4 Here, Plaintiff's ineffective assistance of counsel claims against Eply "necessarily imply
5 the invalidity" of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S. at 487.
6 Were Plaintiff to succeed in showing that Eply rendered ineffective assistance of counsel, an
7 award of damages would "necessarily imply the invalidity" of his conviction. *Id.*; *see also*
8 *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed on ineffective assistance claim
9 petitioner must show that counsel's performance fell below objective standard of reasonableness
10 and that but for counsel's errors the result of the trial would have been different); *Lozada v.*
11 *Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective assistance of counsel is a
12 conditional writ granting petitioner's release unless state retries him or allows him to pursue an
13 appeal with the assistance of counsel within a reasonable time). Thus, because Plaintiff seeks
14 damages for an allegedly unconstitutional criminal proceedings in a criminal case, and because
15 he has not alleged that his conviction has already been invalidated, a section 1983 claim for
16 damages has not yet accrued. *See Heck*, 512 U.S. at 489-90.

17 Moreover, in Plaintiff's Complaint he names United States District Judge Napoleon A.
18 Jones, Jr. as a Defendant for "rejecting [Plaintiff's] appeals." (Compl. at 2.) To the extent
19 Plaintiff seeks damages under § 1983 against District Judge Jones for allegedly failing to give
20 him a "fair judgment," this Defendant is entitled to absolute judicial immunity. *See Stump v.*
21 *Sparkman*, 435 U.S. 349, 359 (1978) (noting the longstanding rule that "[a] judge is absolutely
22 immune from liability for his judicial acts even if his exercise of authority is flawed by the
23 commission of grave procedural errors."); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir.
24 1986) ("Judges and those performing judge-like functions are absolutely immune from damage
25 liability for acts performed in their official capacities.").

26 Thus, Plaintiff's claim against Defendant Jones is dismissed pursuant to 28 U.S.C.
27 § 1915(e)(2)(B)(iii) for seeking monetary relief against a defendant who is immune from such
28 relief.

1 **IV. CONCLUSION AND ORDER**

2 Good cause appearing, **IT IS HEREBY ORDERED:**

3 1. Plaintiff's Motion for Appointment of Counsel is **DENIED** without prejudice
4 [Doc. No. 5].

5 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is
6 **GRANTED.**

7 3. The Secretary of California Department of Corrections and Rehabilitation, or his
8 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
9 owed in this case by collecting monthly payments from the account in an amount equal to twenty
10 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
11 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
12 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
13 ASSIGNED TO THIS ACTION.


14 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
15 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
16 Sacramento, California 95814.

17 **IT IS FURTHER ORDERED** that:

18 5. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which relief
19 may be granted and for seeking monetary damages against an immune defendant pursuant to 28
20 U.S.C. § 1915(e)(2)(B) and § 1915A(b). Moreover, because the Court finds amendment of
21 Plaintiff's § 1983 claims would be futile at this time, leave to amend is **DENIED**. *See Cahill*
22 *v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an
23 abuse of discretion where further amendment would be futile).

24 The Clerk shall close the file.

25 DATED: February 18, 2009

26 
27 **WILLIAM Q. HAYES**
28 United States District Judge